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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/779,402	02/13/2004	Steven J. McCarthy	ID-504 (80226)	2799

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EXAMINER	
NGUYEN, MINH CHAU	
ART UNIT	**PAPER NUMBER**
2445	

NOTIFICATION DATE	DELIVERY MODE
04/21/2009	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Advisory Action Before the Filing of an Appeal Brief	**Application No.** 10/779,402	**Applicant(s)** MCCARTHY ET AL.	
	Examiner MINH-CHAU NGUYEN	**Art Unit** 2445	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 01 April 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:
   a) ☐ The period for reply expires _____months from the mailing date of the final rejection.
   b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

   Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
   (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
   (b) ☐ They raise the issue of new matter (see NOTE below);
   (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
   (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

   NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).
4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
   The status of the claim(s) is (or will be) as follows:
   Claim(s) allowed: _____.
   Claim(s) objected to: _____.
   Claim(s) rejected: _____.
   Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____
13. ☐ Other: _____.

/Patrice Winder/
Primary Examiner, Art Unit 2445

Continuation of 11. does NOT place the application in condition for allowance because: Applicant's arguments under 35 USC 103 have been fully considered but they are not persuasive. Specifically:

Argument 1: "the combination fails to disclose each server determining a respective health metric thereof based upon at least one job being processed thereby and weighting the health metric based upon the respective resource usage characteristic of the at least one job".

In response to applicant's argument, Examiner notes that Albert does disclose each server determining a respective health metric thereof based upon at least one job being processed (i.e. each server determines a usage of processing capacity for each of the virtual machine that is being implemented. The usage of processing capacity of each virtual machine is considered as the respective health metric of one job) thereby and weighting the health metric (i.e. "It is partiularly advantageous to normalize the weight so that the weight of each server expresses its capacity to process packets" in Col. 30, L. 7-10. That means, each server weighting its usage of processing capacity and the usage of processing capacity is from the usages of processing capacity of the virutal machines. Thus, it is considered as the server weights its health metric) based upon the respective resource usage characteristic of the at least one job (i.e. each server includes at least one virtual machine. Therefore, the server's usage of processing capacity is based upon the usages of processing capacity of the at least one virtual machine) (figure 14; and Col. 30, L. 1-Col. 31, L. 3, and L. 49-Col. 32, L. 51).

In addition, Examiner disagree what Applicant's argument in remark such as "the weights of Albert et al. are based upon the amount of resource avaible to the virtual machines, and not the amount of resources used by those virtual machines. As expalined in col. 3, lines 35-38 of Albert et al." (in page 9 of applicant's remarks). First of all, Examiner did not cited the paragraph in col. 3, lines 35-38 in rejection. Secondly, Albert does disclose the weights are based upon the amount of resources used by the virtual machines (i.e. the resources used by the virtual machines are considered as the processing capacity used the virtual machines. It is called as usage of processing capacity of virtual machines) (Col. 30, L. 1-Col. 31, L. 3, and L. 49-Col. 32, L. 51). Moreover, an explaination for the weights are based upon the usage of processing capacity of virtual machines is described above.

Therefore, Albert alone or the combination of references does disclose "each server determining a respective health metric thereof based upon at least one job being processed thereby and weighting the health metric based upon the respective resource usage characteristic of the at least one job".

Argument 2: " the combination of Albert et al. and Richter et al. fails to disclose the servers mapping the weighted health metrics for different resource usage characteristics to a common scale".

In response to applicant's argument, Albert does disclose servers mapping the weighted health metrics (i.e. weights equivalent to weighted health metrics or weighted usage of processing capacity of the virtual machines in the servers) for same resource usage characteristic (i.e. usage service of virtual machines) to a common scale (i.e. a common level of the service of the virtual machine) (for example, "the feedback messages from the real machines is that the messages somehow express the level of load on the real machine" in Col. 30, L. 1-3, and "Thus, each serer determines a weight for each virtual machine…As a result, certain virtual machines may provide a higher level of service than other virtual machine" in Col. 30, L. 61-Col. 31, L. 3) (Col. 3, L. 51-58; and Col. 30, L. 1-31, L. 61-Col. 31, L. 3).

Even though, Albert does not disclose weighted health metrics for different resource usage characteristics. However, Richter as a secondary reference, does disclose the weighted metrics for different resource usage characteristics (paragraph 368,372,374-375,380).

In addition, Examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See In re Fine, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988)and In re Jones, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the motivation to combine Richter's feature of weighting metrics for different resource usage characteristics with Albert's features to provide and generate load balancing for processing engines or servers.

Therefore, the combination of Albert and Richter does disclose the servers mapping the weighted health metrics for different resource usage characteristics to a common scale.

The claims and responses, as discussed in this advisory action, are met by the prior arts. Further discussion will be provided in due course.